

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO. 07 OF 2020

ZAINABU SHABANI KANYARUME.....PLAINTIFF

Versus

MWITA YUSUPH WAMBURA.....1ST DEFENDANT

HASSAN HAJI UKWAJU.....2ND DEFENDANT

HALIMA HASSAN.....3RD DEFENDANT

KCB BANK TANZANIA LTD.....4TH DEFENDANT

JUDGMENT

2nd & 20th September, 2021

RUMANYIKA, J.:

With regard to house on plot no. 85 Block AIII Kirumba Mwanza (the suit house) alleged, in consideration of a bank loan of shs. 100.0m/= mortgaged to KCB Bank Tanzania Ltd (the 4th defendant) by Mwita Yusuph Wambura (the 1st defendant), Zainabu Shabani Kanyarume (the plaintiff) essentially prayed for declaration and orders; **(i)** that the entire disposition was void for want of her consent as spouse **(ii)** that the 4th defendant discharge the mortgage and be restrained permanently from selling the suit house **(iii)** that the 1st, 2nd, 3rd and 4th defendants pay her general

damages of shs. 300,000,000/= and, as usual any other just and fair reliefs and costs.

Messrs v. Kiburika, Z. Bitwale and Dr. G. Mwaiondola learned counsel appeared for the plaintiff, Hassani Haji Ukwaju (the 2nd defendant) and KBC Bank Tanzania Ltd (the 4th defendant) respectively by way of publication through Mtanzania local newspaper of 16/09/2020 duly served but he didn't appear, pursuant to court order of 18/02/2021 appearance of Mwita Yusuph Wambura and Halima Hassan (the 1st and 3rd defendants) respectively was dispensed with hence, only with respect to them exparte judgment.

The issues from the outset, according to records proposed and were adopted by court on 6/7/2021 for determination were;-

- (a) Whether at the time of transfer the suit house was the plaintiff's and the 2nd defendant's matrimonial home.
- (b) Whether transfer of the suit house from the 2nd to the 1st defendant was lawful.
- (c) Whether the subsequent mortgage of the suit house between the 1st to the 4th defendants was lawful.

- (d) Whether the 4th defendant was bonafide transferee/holder of the mortgaged property.
- (e) Reliefs the parties are entitled to.

Pw1 Zainabu Shabani (adult) stated that since 1974 she was under Islamic marriage the sole legal wife of the 2nd defendant and resided at Kirumba area in town blessed with 6 issues (copy of the marriage certificate – Exhibit 'P1"). That they acquired the matrimonial house and home in 1985 only to her surprise to learn that for shs. 100.0m the 1st defendant had on her back mortgaged but he defaulted the bank loan.

Pw2 Abdallah Hassani (47) stated that he was son of the 1st plaintiff and 2nd defendant, a business man in town. That it wasn't until recently when he learnt about the dispute as copy of the mortgage deed it was brought to his attention purportedly consented to by the 3rd defendant as souse but the house belonged to the parents.

Cross examined by Mr. Z. Bitwale learned counsel pw2 stated that the 1st and 2nd defendants may have had some relations that he could not have known before. That is all.

Dw1 Hassan Ukwaju (74) stated that since 1985 until 2016 the suit house belonged to him and, with the plaintiff since 1971 his sole legal wife to date they were blessed with six (6) children and, if anything the 3rd defendant was only his lover until 2018 then in consideration of natural love and affection in writing he gave the house to the 1st defendant with a condition that the latter shall not, in any way dispose it of short of which a nullity agreement. He prayed that as between him and the 1st defendant the transaction be nullified much as the plaintiff did not sign or, in any way consent and he did not even think of involving her.

Cross examined by Dr. George Mwaisondola learned counsel, Dw1 stated that on application he was granted the right of occupancy on 16.08.1984 as sole owner of the suit plot.

Dw2 Hamim Kibwana Gamba (37) stated that since 2016 he was a loan recovery manager employed by the 4th defendant that the 1st defendant, their customer on terms and conditions one having had borrowed shs. 800.0m with 23% interest on 8/6/2016 being business capital recoverable within the first 24 months but the 1st defendant defaulted and as such abandoned the loan which now stood at shs. 126,000,176/= then the former proceeded to attaching and selling the

collateral suit house. Copy of the certificate of title- (Exhibit "D1") but on 05/08/2016 it was transferred to the 1st defendant in that regard leave alone consent of the 1st defendant's wife. The mortgage deed was executed on 23/08/2016 (documents admitted as Exhibit "D2") collectively. That is all.

All least the plaintiff and the 2nd defendant were agreed that the suit house was matrimonial home and the plaintiff was the 2nd defendant's sole legal wife whose evidence the 1st, 3rd and 4th defendants did not sufficiently dispute leave alone attempts to. It follows therefore that the issue of spousal consent of the plaintiff and or the 3rd defendant it was neither here nor there much as neither the 1st defendant nor the 4th defendant sufficiently disproved the allegations that the suit house was in the alleged consideration of natural love and affection but in the back of the wife (the plaintiff) given by the 2nd defendant to the 1st defendant also given an undeniable fact that for reasons known to her, the alleged 2nd wife of the 2nd defendant did not appear in court. On that one but in favor of the plaintiff I am inclined to draw adverse inference (case of **Hemedi Said v. Mohamed Mbilu** (1984) TLR 113 (HC)).

I entertain no doubts to answer issue number (a) in the affirmative issues (b), (c) and (d) are answered in the negative.

At least between spouses the provisions of the Law of Marriage Act Cap. 29 RE. 2019 (the Act) made a clear distinction between matrimonial property and personally acquired property. I am aware of the rule in the case of **Idda Mwakalindile v. NBC Holding Corporation and Another**, Civil Appeal No. 59 of 2000 (CA) unreported quoted with approval in the case of **Hadija Issa Areray v. Tanzania Postal Bank** Civil Appeal No. 135 of 2017 (CA) unreported. It reads thus;-

Under the law of Marriage Act, **a spouse had a registrable interest in the matrimonial home.** In this instance the appellant had not registered her interest. **There was therefore no way the First Respondent could have known of her interest considering that the house was in the sole name of her husband.**

From the quotation above therefore, the highest fountain of justice took cognizance of a spouses' contribution towards acquisition of matrimonial property whether or not registered, jointly or co owned it

wasn't an issue in my considered view but just in the event of default for convenience of the banker or any other lenders therefore a need for spousal consent. With greatest respect therefore, the highest fountain of justice did not, in any way whatsoever intend to frustrate or otherwise render the provisions of the Act redundant.

Moreover, but on an equally serious note, the 4th defendant did not even attempt to dispute the evidence that in consideration of natural love and affection the 2nd defendant gave the house to the 1st defendant yes, but with such stringent condition namely the latter had no right to dispose the suit house for any reasons whatsoever. Once the agreement was executed the 2nd respondent's powers to revoke the title were irreversible yes, but even assuming the wife had consented, with the said clause and condition from its inception the 4th defendant should have avoided the mortgage agreement.

In the final analysis, the suit succeeds in its entirety with costs with orders;- **(a)** the disposition of the suit house was void for want of consent of the plaintiff as spouse **(b)** the 4th defendant discharge the purported mortgage immediately and he is permanently restrained from selling or

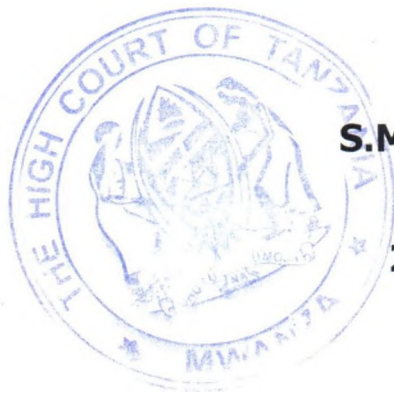
otherwise disposing the suit house (c) in equal amounts each defendants pay the plaintiff shs. 100,000/=as nominal damages. It is so ordered.

Right of appeal explained.

S.M. RUMANYIKA
JUDGE

19/09/2021

The judgment delivered under my hand and seal of the court in chambers this 20/09/2021 in the absence of the parties.



S.M. RUMANYIKA
JUDGE

20/09/2021